

**Before the
Federal Communications Commission
Washington, DC 20554**

In the Matter of	§	
	§	
Review of the Section 251 Unbundling	§	
Obligations of Incumbent Local Exchange	§	
Carriers	§	CC Docket No. 01-338
	§	
Implementation of the Local Competition	§	
Provisions of the Telecommunications Act	§	
of 1996	§	CC Docket No. 96-98
	§	
Deployment of Wireline Services Offering	§	
Advanced Telecommunications Capability	§	CC Docket No. 98-147
	§	

Comments of the Public Utility Commission of Texas

On December 20, 2001, the Federal Communications Commission (FCC) released a *Notice of Proposed Rulemaking (NPRM)* in this proceeding. In this *NPRM*, the FCC initiates its “first triennial review of the Commission’s policies on unbundled network elements (UNEs)” and seeks comment regarding the “circumstances under which incumbent local exchange carriers (LECs) must make parts of their network available to requesting carriers pursuant to sections 251(c)(3) and 251(d)(2) of the Telecommunications Act of 1996 (FTA).”¹ “In particular, the *NPRM* seeks comment on the goals of the Act that should play a role in shaping unbundling policy, such as broadband deployment, investment in facilities, and others.”² Specifically, the *NPRM*

¹ *In the Matter of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Notice of Proposed Rulemaking at ¶ 1 (Dec. 20, 2001) (*NPRM*).

² *Id.* at ¶ 90.

seeks comment on whether the FCC should apply unbundling requirements on the basis of type of service, facility, geography, or other factors (i.e. “more granular statutory analysis”). Additionally, the FCC seeks comment on whether to retain, modify or eliminate its existing definitions and requirements for UNEs; and, on the role of state commissions regarding UNEs.

The Public Utility Commission of Texas (Texas PUC), having general regulatory authority over public utilities within our jurisdiction in Texas, submits these comments in response to the *NPRM*. The Texas PUC believes that states remain in the best position to recognize the “characteristics of markets and incumbent carriers within”³ Texas, and the entry strategies that have worked best. Therefore, it is imperative that states retain the authority to impose additional unbundling obligations on ILECs, provided they meet the requirements of § 251 of the FTA, the policy framework of the *UNE Remand Order*, and any subsequent Commission policy.⁴ As such, the Texas PUC reaffirms its comments made in 1999.⁵

We support a regulatory model in which the FCC establishes the starting point for unbundling network elements with a presumptive national list, coupled with guidelines addressing how elements would be added to or deleted from the list. State regulators would then be allowed to apply those guidelines to the specific market circumstances in their region. If a market contains sufficiently competitive infrastructure components, the incumbent carrier should no longer be the provider of last resort for those elements. On the other hand, if competitors can show that the incumbent carrier possess a network element that is necessary for the provision of a new service, and that element is not available elsewhere, the state regulators should be allowed to add that element to the list.

³ *Id.* at ¶ 75.

⁴ *Id.*

⁵ *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Second Further Notice of Proposed Rulemaking*, Comments of the Public Utility Commission of Texas at Executive Summary (May 25, 1999).

Alternatively, should the FCC pursue a national standard, the Texas PUC strongly recommends that the FCC give consideration to the Performance Measurements (PMs) already in place in Texas,⁶ and, as suggested, convene a Federal-State Joint Conference on UNEs to inform and coordinate this review.⁷ As noted by the FCC in approving Southwestern Bell Telephone Company (SWBT)'s § 271 application, "[a]n extensive and rigorous evaluation of the BOC's performance by the states provides greater certainty that barriers to competition have been eliminated and the local markets in a state are open to competition."⁸

An arbitration is pending at the Texas PUC regarding UNE pricing.⁹ The *UNE Pricing Arbitration* proceeding will directly address several issues posed in this *NPRM*, to include questions regarding:

- Local switching,
- Maintenance of existing equipment,
- Forward-looking loop rates, and
- Unbundled dedicated transport.

⁶ See *Notice of Proposed Rulemaking In the Matter of Performance Measurements and Standards for Unbundled Network Elements and Interconnection*, CC Docket No. 01-318, Comments of the Public Utility Commission of Texas (Jan. 22, 2002) (*UNE Performance Measure NPRM*).

⁷ *NPRM* at ¶ 76.

⁸ *In the Matter of Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order at ¶ 54 (Jun. 30, 2000).

⁹ *Petition of MCImetro Access Transmission Services LLC for Arbitration of an Interconnection Agreement with Southwestern Bell Telephone Company Under the Telecommunications Act of 1996*, Docket No. 24542 (pending) (*UNE Pricing Arbitration*). The Texas PUC held an en banc hearing on this request January 28-30, 2002 and expects to approve an Arbitration Award at its Mar. 21, 2002 open meeting.

Therefore, the Texas PUC reserves its rights to supplement its comments in this proceeding upon adoption of the arbitration decision. This decision is expected to be issued no later than April 1, 2002 and supplemental comments will be provided in this proceeding to the FCC soon after our open meeting currently scheduled for April 18, 2002. Additionally, the Texas PUC has established interim UNE rates for line sharing, and is expected to consider the final arbitration award in the *Texas Line Sharing Arbitration* by early Summer.¹⁰

GENERAL COMMENTS

Competition in the Local Market

In Texas, the second state to gain § 271 approval from the FCC, competitive local exchange carriers (CLECs) had gained, as of December 31, 2000, a 17% share of the local market from Southwestern Bell Telephone Company (SWBT) through a combination of facilities-based, unbundled network element (UNE) based, and resale market entry.¹¹ This is compared to a nationwide market share of 7.6 % for CLECs as a whole. In particular, in Texas “CLECs have tended to rely heavily on [the UNE platform] as an entry strategy.”¹² (See Attachment A for detailed breakdown of § 271 approved applicant market entry data).

¹⁰ *Petition of IP Communication to Establish Expedited PUC Oversight Concerning Line Sharing Issues*, Docket No. 22168 (pending) (*Texas Line Sharing Arbitration*).

¹¹ Daniel R. Shiman and Jessica Rosenworcel, *Assessing the Effectiveness of Section 271 Five Years After the Telecommunications Act of 1996* at 27 (Oct. 2001) .

¹² *Id.* at 20.

Further, the FCC and the Texas PUC are both examining various aspects of the extent of CLECs use of special access services to provide local service.¹³ In Texas, we are examining whether new performance measures are appropriate to monitor SWBT performance where CLECs are using special access services to compete for end-user customers, typically, in the business market.

Market for Advanced Services

Regarding the market for advanced services, the Texas PUC has similar concerns to those expressed by Commissioner Copps in the FCC's *Third Advanced Services Report*.¹⁴ We also question whether there is available data of "adequate quality or granularity" to make decisions regarding the appropriate measures to ensure local competition and encourage the deployment of advanced telecommunications services. Specifically, we question whether there exists, at this time, sufficient intermodal competition to benefit customers.

While advanced services subscriber growth continues, albeit at a slower rate, the take rate for advanced services remains less than 10%. For example, with the dissolution

¹³ NPRM at ¶¶ 62-3 and 80; see also *In the Matter of Performance Measurements and Standards for Interstate Special Access Services*, Notice for Proposed Rulemaking, CC Docket No. 01-321 (rel. Nov. 19, 2001) and *Petition of Southwestern Bell Telephone Company for Arbitration Regarding the Implementation of Special Access Performance Measures*, Docket No. 24515 (pending).

¹⁴ *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Commissioner Copps Dissent at 1 (*Third Advanced Services Report*).

of AT&T's Project Angel and Sprint's decision to halt new deployment, the outlook for competition from the fixed wireless sector has dimmed considerably.¹⁵ Additionally, competition from the satellite industry is in its' fledgling stages and represents less than one percent of the current residential broadband services market.¹⁶

Furthermore, broadband service over cable continues to be the dominant broadband technology accounting for 54% of total high-speed lines as of June 2001,¹⁷ compared to 28% for ADSL and 39% for all wire line products.¹⁸ Meanwhile, "ILECs serve approximately 93% of ADSL subscribers, while competitive LECs serve about 7%."¹⁹ Even more troubling is that, in the last year, CLEC growth in adding DSL customers has been substantially less than ILEC growth.²⁰ Texas, like other states, has also had to deal with a number of high profile bankruptcies involving xDSL providers. In sum, the Texas PUC cautions the FCC against making any finding regarding UNEs or broadband services without compelling data that shows that competition exists for a significant portion of the relevant customer base – whether for local service or broadband.

¹⁵ In Texas, AT&T Fixed Wireless (Project Angel) ceased operation of its network that provided service to over 30,000 customers in the Dallas/Fort Worth, Houston, Beaumont, Bryan/College Station, and Victoria markets. Additionally, Sprint has halted any new deployment of its fixed wireless product for the immediate future.

¹⁶ *Third Advanced Services Report* at ¶ 60.

¹⁷ *Id.* at ¶ 44.

¹⁸ *Id.* at Appendix C, Table 1.

¹⁹ *Id.* at ¶ 51.

²⁰ *Id.*; see also fn 110 (In the first quarter of 2001, the number of competitive LEC customers actually declined and in the third quarter of 2001 was down to 6 percent compared to 16% for ILECs).

ROLE OF THE STATES AND IMPLEMENTATION ISSUES

As discussed above, the Texas PUC urges the FCC, should it choose to move forward in this proceeding, to do so in full collaboration with state regulatory agencies. We believe it would be most prudent to evaluate and address the myriad of issues within this *NPRM* as a whole, and in concert with the states. Such collaboration is based upon our mandate from Congress and our experience in implementation of federal initiatives on the state level.

While cautioning against making decisions on limited information, the Texas PUC encourages the FCC to take advantage of state decisions that are supported by an evidentiary record as it considers these important issues. Consistent with the FTA, the Texas PUC remains the primary fact-finder for most matters regarding UNEs in Texas. For example, the Texas PUC recently issued a decision that included a “stand alone” splitter as a feature and functionality of the local loop.²¹ This decision, based on an evidentiary record, was premised upon the CLEC “purchasing all capabilities of the loop including the low and high frequency spectrum portion of the loop when it purchases the unbundled loop in combination with the switch port or the unbundled network element platform (UNE-P).”²² While the FCC has recognized the ILECs obligation to provide

²¹ *Petition of Southwestern Bell Telephone Company for Arbitration with AT&T Communications of Texas, L.P., TCG Dallas, and Teleport Communications, Inc. Pursuant to Section 252(b)(1) of the Federal Telecommunications Act of 1996*, Docket No. 22315 at 9 (Mar. 14, 2001).

²² *Id.* at 7.

“line splitting” when a CLEC provides its own splitter, due to the complexity of the issue, the FCC has yet to decide the issue of splitter ownership after more than a year.²³

Furthermore, the Texas PUC will soon address the arbitration award in the *Texas Line Sharing Arbitration* and the *UNE Pricing Arbitration*. Additionally, we have recently addressed prices, terms, and conditions for collocation.²⁴ The Texas PUC, further, in supporting approval of SWBT’s FTA § 271 application, performed substantial investigation into multiple parties’ specific experiences and continues to monitor SWBT’s performance, as it relates to the 14-point checklist.²⁵ These are examples of the valuable role states can, and often play, in implementing the local competition provisions of the FTA and in encouraging the deployment of advanced telecommunications services pursuant to § 706.

During this time of significant transition in the telecommunications industry, federal and state regulators will be instrumental in assuring that local competition continues to take root and the deployment of advanced services is encouraged. We sincerely believe that federal and state cooperation is essential to determine the effects upon end users and to ensure that end users fully participate in the benefits of competition. In addition, federal and state regulators must ensure that decisions are in the public interest, a standard applicable to both the FCC and the states.

²³ *Deployment of Wireline Services Offering Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration, CC Docket No. 98-147; Fourth Report and Order on Reconsideration, CC Docket No. 96-98; Third Further Notice of Proposed Rulemaking, CC Docket No. 98-147; Sixth Further Notice of Proposed Rulemaking in CC Docket No. 96-98 at ¶ 19 (Jan. 19, 2001).

²⁴ *Proceeding to Establish Permanent Rates for SWBT’s Revised Physical and Virtual Collocation Tariffs*, PUC Docket No. 21333, Order Approving Revised Arbitration Award (Jun. 7, 2001).

²⁵ See 47 U.S.C. § 271(c)(2)(B)(i) – (xiv).

CONCLUSION

The Texas PUC appreciates the opportunity to comment on the FCC's *NPRM*, and to assist the FCC in developing long-term solutions to the issues addressed. We also look forward to providing the FCC with additional information upon completion of our *UNE Pricing Arbitration* and approval of the award.

Respectfully submitted,

**Public Utility Commission of Texas
1701 N. Congress Avenue
Austin, Texas 78711-3326**

March 18, 2002

/original signed/

**Brett A. Perlman
Commissioner**

/original signed/

**Rebecca Klein
Commissioner**

Percentage of BOC Switched Lines Purchased by CLECs -- June 2001

State	BOC	Total BOC Lines	BOC % of ILEC Lines	Lines Purchased by CLECs				
				Percent Resale	Percent UNE-P	Percent UNE-L	Percent Total	Total CLEC Lines
Approved 271 Applicants (more than 1 year)								
New York	Verizon	12,050,789	89%	3.0	14.5	2.2	19.6	2,365,206
Texas	SWBT	8,947,790	79%	3.3	13.3	1.1	17.7	1,586,888
Approved 271 Applicants (less than 1 year)								
Oklahoma	SWBT	1,660,815	83%	3.2	1.5	0.3	4.9	81,690
Kansas	SWBT	1,389,742	84%	5.7	3.9	0.3	9.9	137,041
Massachusetts	Verizon	4,636,622	100%	5.8	0.6	1.8	8.2	378,294
Connecticut	Verizon	57,893	99%	3.5	0.0	0.9	4.4	2,547
Pennsylvania	Verizon	6,366,128	77%	2.0	3.7	2.4	8.1	516,057
Missouri	SWBT	2,605,726	75%	4.1	2.3	0.3	6.7	173,384
Arkansas	SWBT	1,048,587	69%	3.3	0.5	1.6	5.4	56,340
Nationwide		141,311,809	75%	3.1	3.0	1.6	7.6	10,765,430

Source: FCC's ARMIS database. BOC Performance Metric Reports (Shiman and Rosenworce, Assessing the Effectiveness of Section 271 Five Years After the Telecommunications Act of 1996)